

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2294 OF 2003.
IN
SUIT NO. 2125 OF 1996

Sureshchandra Ganeshlalji Jain.] .. Plaintiff

Versus

Karim Miyaji Maredia & Others.] .. Defendants

Mr.C.P. Deogirikar for plaintiffs.

Ms.Meena Kshirsagar for defendant No.2.

Mr.R.P. Tripathi i/b K.K. Pandey for defendant Nos.3
to 6.

CORAM: ANOOP V. MOHTA, J.

DATED: 12TH SEPTEMBER, 2005

P.C. :

1. A Notice of Motion has been taken out by the original plaintiffs in a Suit which was pending, wherein by an order dated 4th April, 2002, the Prothonotary & Senior Master passed the order of dismissal of the Suit against original defendant Nos.1 to 4 and 6 and 7 for default. Therefore, the present Notice of Motion for restoration, after delay of more than 14 months.

2. Heard the learned counsel appearing for the parties. There is a undisputed position on the record that when the Suit was dismissed on 4th April, 2002, the original defendant No.2, as well as, defendant No.3 to 6 had already filed their appearances on the record. The learned counsel appearing for the plaintiffs, therefore, rightly relied on Rule 84, Rule 87 of the High Court of Judicature at Bombay [Original Side] Rules apart from the provisions of the Civil Procedure Code i.e. Section 27 read with Order IX Rule 2 (amended provisions) [Act 22 of 2002].

3. The above provisions are very clear to support the case of the plaintiffs so far as dismissal of the suit against the parties whose appearances were already on the record. Assuming for a moment that the dismissal of the Suit was for want of service of summons, still the undisputed facts are on the record that at the relevant time when the suit in question was pending, the appearances of respondents, as stated above, were already on the record. Defendant No.2 here is the wife of the defendant No.1. Defendant No.1, as contended, is the main contesting party to the proceedings. There was no application or Notice of Motion taken out by any of the defendants on the foundation that they were not necessary parties. Therefore, on the date of dismissal

of the suit, all the defendants were contesting the said suit.

4. Without observing anything on merit, I am of the view that the order dated 4th April, 2002, passed by the Prothonotary & Senior Master need to be interfered with and the suit is required to be restored.

5. The learned counsel appearing for the defendants, however, basically objected and pointed out the delay in taking out this Notice of Motion for restoration which, according to them, is of more than 14 months. This undisputed position has been averred in the Affidavit in support of the Notice of Motion. Even though there is no counter Affidavit to this Affidavit in support of the Notice of Motion, still on the face of the record, there is no doubt that the delay of more than 14 months occurred in the matter. This is again one of those cases where the plaintiffs suffered because on 4th April, 2002, the Advocate appearing for the plaintiffs was absent. It was endorsed that even earlier, on two occasions, no one appeared on behalf of the plaintiffs. Plaintiffs, therefore, by letter dated 10th July 2003, enquired from the erstwhile Advocate about the matter, mentioning the details in regard to the dismissal order in question. There was no reply to

the same. Therefore, there was no sufficient explanation and/or no explanation whatsoever has been received by the plaintiffs from the earlier Advocate. The plaintiffs came to know about the dismissal of the suit as observed above and thereafter applied for the certified copy and the same was received on 26th June, 2003. The present Notice of Motion has been taken out, as averred, on 7th August, 2003. Therefore, from the date of impugned order dated 4th April, 2002, even if there is delay, it cannot be said that there is no sufficient ground or reason made out by the plaintiffs for condonation of delay. From the date of receipt of the order, i.e. 26th June, 2003, there is no much delay in filing the present Notice of Motion.

6. Considering the above facts, the impugned order dated 4th April, 2002, is quashed and set aside. The suit is restored to file. The Notice of Motion is accordingly allowed in terms of prayer clauses (a) to (c). However, it will be subject to payment of costs of Rs.1,500/- to the defendant No.2 (the wife of defendant No.1) and Rs.1,500/- which shall be equally divided amongst defendant Nos.3 to 6, payable within two weeks from today, as a condition precedent.

. Defendants waive Notice. The Notice of Motion

is accordingly disposed of.

[ANOO P V. MOHTA, J.]